Supreme Court, U. S.
FILED
DEC 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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This brief is submitted in opposition to the motion of the New York State Consumer Protection Board ("CPB") for leave to file a brief *amicus curiae*. We believe it is our duty to object to the granting of this motion because under New York law the CPB has no statutory authority to file an *amicus* brief in this appeal.

The scope of the CPB's statutory authority was reviewed in *Pooler* v. *Public Service Commission,* 58 A.D.2d 940 (3d Dept. 1977), *aff'd,* 43 N.Y.2d 750 (1977).* It was there held that while the CPB has statutory authority to represent consumers in proceedings before the Public

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* The CPB's organic act is reprinted in the appendix to this brief.

Service Commission, its authority terminates with the issuance of the final order of the Public Service Commission. Thus, the CPB has no statutory authority to participate in judicial proceedings to review decisions of the Public Service Commission.

Subsequent to the New York Court of Appeals' decision in *Pooler,* the New York Legislature conferred limited authority on the CPB to participate in judicial appeals involving utility rates. 1978 N.Y. Laws, ch. 120. The issue on this appeal is whether the Public Service Commission's bill insert ban is valid. Con Edison's rates are not at issue on this appeal.

For the foregoing reason, the motion of the New York State Consumer Protection Board for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

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December 1979

APPENDIX

Article 20 of the New York Executive Law (McKinney 1972 and Supp. 1972 to 1979), relating to the State Consumer Protection Board, provides:

§ 550. State consumer protection board

There is hereby created in the executive department a state consumer protection board, hereafter referred to in this article as the board, which shall consist of the chairman of the public service commission, the superintendents of banking and insurance, the commissioners of agriculture and markets, environmental conservation, commerce and health, the secretary of state and the executive director of the board. Members of the board other than the executive director shall receive no compensation for their services as members, but shall be allowed their actual and necessary expenses incurred in the performance of their duties. The attorney general shall coordinate the enforcement powers of his office with the activities of the board.

§ 551. Executive director

The executive director shall be the chairman of the board. He shall be appointed by the governor with the advice and consent of the senate and shall hold office during the pleasure of the governor and shall receive an annual salary to be fixed by the governor within the amount available therefor by appropriation. He shall also receive his reasonable expenses in connection with the performance of his duties within the amount available therefor by appropriation.

§ 552. Organization of the board

The executive director may establish, consolidate, reorganize or abolish any organizational units under the board as he determines to be necessary for efficient operation. He shall assign appropriate functions to any such unit and may appoint such staff, agents and consultants as he may deem necessary and prescribe their duties and fix their compensation within the appropriation provided by law.

§ 553. Powers and duties of the board and the executive director

1. The board shall have the power and duty to:

a. coordinate the activities of all state agencies performing consumer protection functions; and

b. prepare each year a report to the governor and to the legislature of its activities.

2. The executive director shall have the power and duty to:

a. receive complaints of consumers and refer them to the appropriate federal, state or local agency authorized by law for appropriate action on such complaints;

b. advise and make recommendations to the governor on matters affecting the consumers of the state and promote and encourage the protection of the legitimate interests of consumers within the state; and

c. on behalf of the board, initiate, intervene in, or participate in any proceedings before the public service commission, to the extent authorized by sections twenty-four-a, seventy-one, eighty-four or ninety-six of the public service law or any other applicable provision of law, where

he deems such initiation, intervention or participation to be necessary or appropriate.

3. The executive director when so directed by the board shall have the power and duty to:

a. conduct investigations, research, studies and analyses of matters affecting the interests of consumers;

b. cooperate with and assist the attorney general in the carrying out of his legal enforcement responsibilities for the protection of consumers;

c. cooperate with and assist consumers in class actions in proper cases;

d. represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies;

e. study the operation of consumer protection laws and recommend to the governor new laws and amendments of laws for consumer protection;

f. conduct product research and testing and, where appropriate, contract with private agencies and firms for the performance of such services;

g. initiate and encourage consumer education programs;

h. cooperate with and assist local governments in the development of consumer protection activities;

i. establish advisory councils to assist in policy formulation on specific consumer problems; and

j. undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion and sale of consumer goods and services.

§ 553. Note

Appeal from Public Service Commission Rates. Section 1 of L.1978, c. 120, eff. May 9, 1978, provided:

"Notwithstanding any provision of law to the contrary, the consumer protection board shall be entitled, as a matter of right, through its counsel, to take a judicial appeal pursuant to article seventy-eight of the civil practice law and rules on any final decision of the public service commission involving the establishment of rates, where the board was a formal party to a proceeding before such commission in which such rates were reviewed or determined. The board shall also be entitled, as a matter of right, through its counsel, to appeal any refusal of the commission to review, determine or modify a rate, or to initiate a formal proceeding for such purpose."